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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. [redacted] 156

CLAYTON S. KRAMER,
Petitioner,

v.

CARIBBEAN MILLS, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner Clayton S. Kramer respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on January 26, 1968.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. No opinion was rendered by the District Court for the Northern District of Texas.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on January 26, 1968. A timely petition

for rehearing *en banc* was denied on March 5, 1968, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether federal diversity jurisdiction can be created by a lawful assignment of a money claim to a plaintiff.

2. Whether the assignment of a money claim is "improper" or "collusive" within the meaning of 28 U.S.C. § 1359 where (a) the assignment is legal under state law and (b) the motive for the assignment is to gain access to the federal court by creating diversity of citizenship.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 28:

§ 1359. Parties collusively joined or made

> A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court.

STATEMENT OF THE CASE

A dispute arose between two alien corporations: (1) Caribbean Mills, Inc., the respondent herein, incorporated under the laws of Haiti, and (2) Panama and Venezuela Finance Co., incorporated under the laws of Panama. The dispute concerned a written agreement between the two corporations, dated June 4, 1959, under which Caribbean Mills agreed to pay Panama and Venezuela Finance Co. and/or one Roy Kelly the sum of $250,000 relative to certain stock transfers. Of that amount, $85,000 was to be paid at the closing of the agreement and the remaining $165,000 was to be paid in twelve designated installments.

The initial payment of $85,000 was duly made, but for reasons that are disputed but not now relevant, Caribbean Mills refused to make any of the installment payments on the remaining $165,000 obligation, despite repeated demands

by Panama and Venezuela Finance Co. The first of these unpaid installments had become due on June 1, 1962. In the instant action, the District Court found that these payments had been wrongfully withheld and, after submitting various special issues to a jury, granted judgment against Caribbean Mills in the amount of $165,000, plus interest and costs. R. 536-537.

The plaintiff in this proceeding, and the petitioner herein, was Clayton S. Kramer, an attorney in Wichita Falls, Texas. He became the plaintiff by virtue of an assignment to him on September 21, 1964, of all of the rights, titles and causes of action that Panama and Venezuela Finance Co. had with respect to the 1959 agreement. R. 438-440. This assignment read as follows:

> Assignment.
>
> Know All Men By These Presents:
>
> That we, the undersigned Panama and Venezuela Finance Company, a Panamanian Corporation, for and in consideration of One Dollar ($1.00) and other good and valuable consideration, receipt of which is hereby acknowledged, does hereby assign, sell and convey to Clayton S. Kramer of Wichita Falls, Wichita County, Texas, all of our right, title and interest, including all actions, causes of actions, claims, right to make demands, right to designate place of performance and payment, monies due and/or to become due, arising from or out of a certain agreement and contract in writing, dated June 4, 1959, between Caribbean Mills, Inc., a Haitian Corporation, Roy B. Kelly of Washington, D.C. and Panama and Venezuela Finance Company, under which contract or agreement Caribbean Mills agreed to pay to Panama and Venezuela Finance Company and/or Roy B. Kelly the sum of Two Hundred Fifty Thousand Dollars ($250,000.00) on such terms and at such times as were more fully set out in said instrument, a copy of which is attached hereto as Exhibit A, and fully incorporated herein by reference. This assignment specifically includes another certain agreement, made

in connection with the original agreement heretofore described, such other agreement being a collateral agreement and contract of Murchison Brothers and others, dated on or about June 4, 1959, a copy of such agreement is also attached hereto as Exhibit B, and fully incorporated herein by reference.

Panama and Venezuela Finance Company warrants to Assignee herein that it is the owner of and entitled to all benefits arising by virtue of the agreements and/or contracts herein assigned and has the right to make this assignment of the same.

It is agreed that this assignment to the said Clayton S. Kramer is made under the laws of the State of Texas, and in the event that there is any question of validity of such assignment, it shall be construed and governed by the laws of the State of Texas, and the powers, duties and benefits flowing hereunder to the said Clayton S. Kramer shall be controlled by the laws of the State of Texas.

That I, the undersigned officer of Panama and Venezuela Finance Company am specifically authorized and empowered to make such assignments to Clayton S. Kramer and such contract for Panama and Venezuela Finance Company herein.

Made and executed on this the 21st day of Sept., A.D. 1964.

PANAMA AND VENEZUELA
FINANCE COMPANY,
By E. ALFARO

Simultaneously with the execution of the foregoing assignment, the petitioner and Panama and Venezuela Finance Company entered into a separate agreement (Def. Ex. 4) reading as follows:

AGREEMENT

STATE OF TEXAS
COUNTY OF WICHITA:

KNOW ALL MEN BY THESE PRESENTS: That we, Panama and Venezuela Finance Company, a Pana-

manian corporation, and Clayton S. Kramer, do hereby agree and contract as follows:

WHEREAS, previously the Panama and Venezuela Finance Company, for valuable consideration, by instrument in writing, irrevocably assigned, sold and conveyed to Clayton S. Kramer all of its right, title and interest under and arising out of a certain contract or agreement closed June 4, 1959, between Panama and Venezuela Finance Company, Caribbean Mills, Inc., and Roy B. Kelly, together with an assignment of a connected agreement dated on or about June 4, 1959, from Murchison Brothers and others; and,

WHEREAS, the said Clayton S. Kramer is now the sole owner of any action or causes of action derivative therefrom, with the independent right of management, control and prosecution thereof, and does hereby indemnify and hold harmless the Panama and Venezuela Finance Company from any cost or expense that has or may arise out of the prosecution of any demand or suit on said contracts; and,

WHEREAS, the said Clayton S. Kramer agreed to make demand on said contracts and collect or prosecute to final Judgment all claims thereon; it is hereby collaterally Agreed, that in the event of payment to or recovery on said contracts by Clayton S. Kramer, he will pay solely as a Bonus to Panama and Venezuela Finance Company, or anyone properly designated by it in writing, a sum equal to 95 per cent of the net proceeds or monies obtained from Caribbean Mills, Inc., or others, under or by virtue of the contracts heretofore assigned to the said Clayton S. Kramer, it being understood by the parties hereto, that the said Clayton S. Kramer shall have the right to employ attorneys on a contingent fee basis, paying to such attorneys an amount not to exceed thirty-three and one-third per cent (33 1/3%) of the gross recovery obtained from Caribbean Mills or others, and to pay expenses of litigation not to exceed one-half (1/2) the total of such expenses. In other words, after the payment of attorney fees and expenses,

Clayton S. Kramer is to pay to Panama and Venezuela Finance Company or its order, ninety-five (95) per cent of the remainder of the net recovery, if any, and retain five (5) per cent for his own use and benefit.

This contract and agreement by and between the parties hereto is made and is to be performed in the State of Texas; that the same was drawn by the parties with reference to the laws of the State of Texas, and it is hereby specifically contracted and agreed that in the event of any controversy, dispute or litigation relating to or arising out of this instrument, the laws of the State of Texas specifically control. In consideration of our mutual promise and consideration with which this instrument passes, we set our hands hereunto on this the 21st day of Sept. A.D. 1964.

/s/ Clayton S. Kramer
Clayton S. Kramer

PANAMA & VENEZUELA
FINANCE COMPANY

As a result of the foregoing instruments, the petitioner Kramer as a resident and citizen of Texas brought the instant action in a federal court in the Northern District of Texas. The defendant Caribbean Mills was named as a foreign corporation, organized and existing under the laws of Haiti. Over its objections, the corporation was found by the District Court to be doing sufficient business in the Northern District of Texas to permit service of process in that district. R. 381-382.

The $165,000 judgment rendered by the District Court in petitioner's favor was reversed by the Court of Appeals on the sole ground that diversity jurisdiction was lacking over the subject matter. The Court of Appeals held, in short, that by virtue of 28 U.S.C. § 1359 an assignee for collection purposes cannot properly invoke federal diversity jurisdiction, at least where the assignment "was made for the purpose of creating federal jurisdiction without divesting the

assignor of his interest in the law suit." See p. 4 of Appendix hereto.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts With the Decisions of Other Courts of Appeals as to the Proper Interpretation of 28 U.S.C. § 1359.

Section 1359 of Title 28 provides that a federal court shall have no jurisdiction of a civil action "in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court."

In reliance upon what it conceived to be the principles established before the 1948 revision of this statute, the Fifth Circuit has here held that "impropriety" or "collusiveness" within the meaning of § 1359 includes something less than "fraud or deceit, actual impropriety, or collusion with the other side." See p. 15 of Appendix hereto. It also means, said the court, "an attempt to create federal jurisdiction by colorable assignment or other device without substance." See pp. 15-16 of Appendix hereto.

In so holding, the Fifth Circuit conceded that its interpretation of § 1359 conflicts with that adopted by the Third Circuit in *Corabi v. Auto Racing, Inc.*, 264 F.2d 784, 788. Charging that the Third Circuit had "virtually emasculated the statute" by "focusing on the literal meanings of the two words" (See p. 15 of Appendix hereto), the Fifth Circuit declined to follow the Third Circuit's reading of "collusion" as indicating only a secret agreement for a fraudulent or deceitful purpose or of "improper" as meaning no more than some sort of impropriety.

The Fifth Circuit here could find no "collusion" or "impropriety" in the *Corabi* sense, for there was no secret collusion between the petitioner and the respondent, nor was there any legal impropriety in the assignment to petitioner of the Panama and Venezuela Finance Company claims.

That assignment was plainly lawful under relevant Texas law.[1] Moreover, such a legal assignment for purposes of collection made the petitioner the real party in interest under Rule 17(a), F.R.C.P., for purposes of prosecuting this action. 3A Moore's Federal Practice, Sec. 17.09, p.271 (1967); *Dixie Portland Flour Mills, Inc. v. Dixie Feed & Seed Co.*, 272 F.Supp. 826, 830 (W.D.Teun.).

The most that the Fifth Circuit could say was that this lawful assignment was "colorable in the sense that it did not divest the assignors of their interests in the lawsuit, and it was made for the purpose of creating diversity."[2] Appendix, p. 17, *infra.* But that makes the conflict with *Corabi* more complete. While *Corabi* was concerned not with an assignment of a money claim but with the appointment of a nonresident administrator of an estate, the appointment there was for the express purpose of creating diversity of citizenship between the parties. And even with that purpose established, the Third Circuit held that there was no collusion or impropriety within the scope of § 1359. Thus the conflict between the decision below and *Corabi* is complete.

Moreover, the Fifth Circuit found the Tenth Circuit's decision in *Bradbury v. Dennis*, 310 F.2d 73, "difficult to

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[1] The record discloses that, as consideration for the assignment, the petitioner Kramer (a) paid $1.00 in cash, (b) agreed to indemnify and hold harmless the Panama and Venezuela Finance Company from any sums of money it might owe or become obligated to pay as a result of efforts to enforce the 1959 agreement in question, and (c) promised performance of certain services, i.e., accepting the assignment and assuming the management, control and burden of any action taken to enforce the contract.

[2] Had the suit been brought by the Panama and Venezuela Finance Company, a Panama corporation, there would have been no federal jurisdiction. A federal court has no jurisdiction of a suit between two alien corporations where no federal question is involved. *Montalet v. Murray*, 4 Cranch 46. But the diversity statute, 28 U.S.C. § 1332, does extend federal jurisdiction to suits between a citizen of a State and a citizen or subject of a foreign country. Petitioner, as a citizen of Texas, could thus invoke federal jurisdiction in suing a corporation of Haiti, provided more than $10,000 was in controversy.

reconcile with pre-revision cases" upon which the Fifth Circuit had relied. See p. 12 of Appendix hereto. *Bradbury* is indeed difficult to reconcile with the decision below, for *Bradbury* held that § 1359 does not defeat an attempt to create diversity jurisdiction through a claim assignment supported by adequate consideration and operating to the prejudice of no one.[3] Such an assignment, indistinguishable from the instant one in its legal base, was held not to constitute collusion or impropriety for § 1359 purposes.

The Eighth Circuit has followed the lead of the Third and Tenth Circuits in interpreting § 1359 in a manner inconsistent with the reading of the court below. See, e.g., the Eighth Circuit's rulings in *McCoy v. Blakely*, 217 F.2d 227, 230; and *County of Todd, Minn. v. Loegering*, 297 F.2d 470, 473, holding that the appointments of non-resident administrators and trustees for "the sole purpose of creating diversity" are not in contravention of the policy or language of § 1359. See also *City of Eufaula, Alabama v. Pappas*, 213 F.Supp. 749 (M.D. Ala.) holding that the transfer of land interests to an out-of-state family member, for which $1.00 consideration was paid, for the purpose of creating diversity jurisdiction was not violative of § 1359; the Fifth Circuit in its opinion below found itself "unable to distinguish this case from the one before us, but we choose not to follow it." Appendix, p. 17, *infra*.

These conflicts justify the grant of certiorari to review the judgment below.

Under Texas law, "an Assignee [i.e., Kramer] of a chose in action may maintain an action against the obligor [i.e., Caribbean Mills], even though he paid no consideration for the assignment." 6 Tex. Jur. 2d 460. See also *Hughes v. Dopson*, 135 S.W.2d 148, 149-150 (Tex. Civ. App.), holding that an assignee of notes can maintain suit thereon "regardless of the amount of consideration paid by him, or, in fact, whether or not he had paid anything at all as consideration therefor."

[3] This point was reaffirmed by the Tenth Circuit in a subsequent appeal in the same case. *Bradbury v. Dennis*, 368 F.2d 905, 907.

2. The Decision Below Raises Significant and Recurring Problems Concerning Efforts To Invoke and Create Federal Diversity Jurisdiction.

The Fifth Circuit's opinion in this case reflects important statutory and policy considerations growing out of bona fide efforts to invoke and create federal diversity jurisdiction. And particularly since this Court has not had occasion to address itself to these matters since the 1948 revision of § 1359, there are compelling reasons why some definitive guidelines in the application of § 1359 should now be marked by this Court. Efforts to create federal jurisdiction are of common if not increasing occurrences, and both litigants and lower courts urgently need the assistance of this Court in understanding the policies and the language of § 1359. Among the unanswered questions thus posed are:

(1) Is § 1359 to be interpreted according to the plain meaning of its "collusive" and "improper" terminology, as the Third Circuit did in *Corabi*, or are those words to be ignored in favor of effectuating what some believe to be the desirable policy of foreclosing diversity jurisdiction to all who seek by lawful means to create it?

It has often been assumed that § 1359 as now written "has served to bar jurisdiction based on assignments which are solely for collection or otherwise no more than colorable."[4] But that assumption is undermined by the recognized fact that § 1359 has been rendered "largely ineffective" in barring jurisdiction based on such assignments by the uniform line of decisions, epitomized by *Corabi*, "that a party's actions are not 'improper' or 'collusive' within the meaning of the statute, even though the sole motive was to gain

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[4] A.L.I., Study of the Division of Jurisdiction Between State and Federal Courts, Proposed Final Draft No. 1 (April 19, 1965), Commentary § 1307, p. 101.

access to federal court, if the actions were lawful in themselves."[5]

(2) To what extent is the motive of creating diversity relevant to the application of the § 1359 proscription? In dealing with the legislative predecessors of § 1359, this Court has seemingly given inconsistent answers to the importance to be attached to such a motive. In *Lehigh Mining & Mfg. Co. v. Kelly*, 160 U.S. 327, *Williams v. Nottawa*, 104 U.S. 209, and *Miller & Lux, Inc. v. East Side Canal & Irrigation Co.*, 211 U.S. 293—all relied upon by the Fifth Circuit in this case—the Court held that corporate transfers for the purpose of creating federal jurisdiction could not be recognized. But those decisions were distinguished in *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, 276 U.S. 518, 524, and the rule was established that where the transfer is legal and actual, not feigned, "courts will not inquire into motives when deciding concerning their jurisdiction. . . . It is enough that respondent is the real party in interest." See also *Mecom v. Fitzsimmons Drilling Co.*, 284 U.S. 183; *City of Chicago v. Mills*, 204 U.S. 321; *Blair v. City of Chicago*, 201 U.S. 400.

Both the Third Circuit in *Corabi* and the Fifth Circuit in this case recognized these two conflicting lines of decision by this Court and sought to reconcile them—with differing results. Obviously, the time has come for this Court to treat the motive problem definitively and in the light of § 1359, the modern version of the statutory policy that concerned the Court in these earlier cases.

(3) To what extent should a desire to restrict federal diversity jurisdiction affect the interpretation and application of § 1359? Plainly, the Fifth Circuit here felt that "the historic policy of limiting diversity jurisdiction" (Appendix, p. 17, *infra*) justified its broad reading of § 1359. On the

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[5] Wright, Federal Courts, § 31, p. 86 (1963). In this case, of course, the assignment was lawful under Texas law; it was considered improper by the Fifth Circuit only because of the motive to create jurisdiction.

other hand, the Third Circuit in *Corabi*, 264 F.2d at 788, felt that to achieve the policy result here reached by the Fifth Circuit would require a legislative change: "Had Congress intended to prohibit the creation of federal diversity jurisdiction under such circumstances as those at bar it could have done so simply by omitting the words 'improperly or collusively' . . . . it would be improper for that change to emanate from this court." Such a deep division over the policy that the federal courts can legitimately achieve in applying § 1359, needs attention and resolution by this Court.

Finally, it should be noted that the practice of utilizing legitimate devices for creating federal diversity jurisdiction is a universal and widespread one. A study conducted by the American Law Institute of the diversity actions brought in the federal court in Philadelphia has indicated that approximately 20% of those actions were instituted by out-of-state fiduciaries, apparently handpicked to create the necessary diversity.[6] Such common practices underscore the desirability of a thorough reexamination of the problem by this Court so that litigants and lower courts may properly gauge what is legitimate and illegitimate under § 1359.

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[6] A.L.I., Study of the Division of Jurisdiction Between State and Federal Courts, Official Draft (Sept. 25, 1965), Pt. I, App. B, 170, 175.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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June 3, 1968

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 24090

CARIBBEAN MILLS, INC.,
Appellant,

versus

CLAYTON S. KRAMER,
Appellee.

Appeal from the United States District Court for the Northern District of Texas.

(January 26, 1968.)

Before BROWN, Chief Judge, and BELL and THORNBERRY, Circuit Judges.

THORNBERRY, Circuit Judge: Because we conclude that the requisite diversity of citizenship does not exist in this case, it will not be necessary to recite the facts in great detail. Appellant, Caribbean Mills, Inc., is a foreign corporation organized under the laws of Haiti where it operates a flour mill. On May 30, 1959, it entered into a written agreement with a man named Kelly from Washington, D.C. and the Panama and Venezuela Finance Company, a for-

eign corporation organized under the laws of Panama. Under the terms of the agreement, appellant was to purchase from Panama 125 shares of corporate stock for a down payment of $85,000 plus installment payments amounting to an additional $165,000. Because of subsequent developments and appellant's interpretation of the contract in light of these developments, the installment payments were never made.

On September 21, 1964, Panama and Kelly assigned their interests under the 1959 contract to Clayton Kramer, an attorney in Wichita Falls, Texas and appellee here. The consideration was $1.00. By separate instrument executed on the same day, Mr. Kramer reassigned 95% of his newly acquired interest to Panama.[1] Thereafter, he filed suit against Caribbean Mills for $165,000 in the United States District Court for the Northern District of Texas.[2] The trial judge overruled appellant's motion to dismiss on jurisdictional grounds and proceeded to trial. The question of contract interpretation was submitted to a jury, which returned a verdict in favor of appellee for $165,000. In appealing the judgment entered on this verdict, Caribbean Mills urges, *inter alia*, that the sole purpose of the assignment from Panama to Kramer was to create diversity of citizenship under 28 U.S.C. § 1332 (a)(2) (suit between citizen of

[1] Under the second instrument, Kramer had the right to pay his attorney 33-1/3% of any recovery. He was to retain 5% of the remainder and pay Panama 95% as a "bonus."

[2] There is no question that appellant had sufficient business contacts in Dallas, Texas to render itself amenable to process in the Northern District.

a state and citizen of a foreign state) and that such a tactic brings into play 28 U.S.C. § 1359, which says that a federal court shall not have jurisdiction where a party "by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court." On oral argument before this Court, counsel for appellee made no particular effort to deny that Mr. Kramer is simply an assignee for purposes of collecting Panama's claim in federal court, but he argued that the assignment from Panama is valid on its face and that under the decided cases the motives for making it are of no import. Because we believe that 28 U.S.C. § 1359 has more force than appellee is willing to admit, we must reverse and remand with directions to dismiss for want of jurisdiction. While it may seem wasteful to divest the federal courts of jurisdiction after judgment has been entered on a jury verdict, there are deeper considerations which compel this result. In construing the very statute before us, the Tenth Circuit said,

> But, after all, it is the words of a federal statute we construe in the context of an historical purpose to deny diversity jurisdiction when it would operate to serve a purpose which is unsuited to the good order of federal court administration.

Bradbury v. Dennis, 10th Cir. 1962, 310 F.2d 73, 76.

I.

By assigning its interest under the contract and obtaining a reassignment of 95% of that interest on the same day, Panama obviously intended to designate Kramer as a collection agent with the capacity to sue in federal court. To construe these transactions in another way would require serious departure from any traditional notion of reality. The question presented, then, is whether under Section 1359 an assignee for collection purposes can properly invoke federal jurisdiction. In our view, he cannot do so because the assignment to him was made for the purpose of creating federal jurisdiction without divesting the assignor of his interest in the law suit. To support this conclusion, we must delve into the history of Section 1359 and some of the old cases.

Broadly speaking, Section 11 of the Judiciary Act of 1789 denied federal jurisdiction to an assignee of a cause of action if it was unavailable to his assignor, *i.e.*, if his assignor could not have brought the same suit in federal court. With changes in language, the "assignee clause" remained a part of the law until 1948. Wright, *Federal Courts* § 31, at 85 (1963 ed.). Section 37 of the Judicial Code of 1911, which stemmed from the Act of 1875, commanded the dismissal or remand of an original or removed action when the parties had been "improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable." 3 J. Moore, *Federal Practice* ¶ 17.05, at 1319 (1967 ed.).

In the 1948 Judicial Code, the Reviser condensed these two sections into Section 1359, the statute we have today. The Reviser's Notes indicate that the purpose of condensing the two sections into one was twofold: To eliminate confusing and unnecessary exceptions to the assignee clause and to eliminate the effect of that clause on bona fide assignees. Under the original clause, a bona fide assignee could not sue in federal court unless his assignor could have; under Section 1359, any assignee can sue in federal court so long as he was not improperly or collusively made a party in order to invoke federal jurisdiction. The Reviser's Notes do not suggest any other change in law or policy.

With this legislative background in mind, we turn to the pre-revision cases. These cases clearly reveal that the device employed by Panama would not have passed muster under pre-revision statutes. *Williams v. Nottawa*, 1881, 104 U.S. 209, 26 L.Ed. 719, involved an action against a township upon township bonds payable to bearer. Williams, the plaintiff, sued on three of the bonds as owner; but the rest of them had been transferred to him for collection purposes by citizens of Michigan, the state in which the township was located. The Supreme Court held that the transfer was colorable in the sense that it was never intended to change the ownership and was made only for the purpose of "creating a cause cognizable in the courts of the United States." The suit was therefore dismissed as being in contravention of the policy of the Act of 1875. The Reviser's Notes do not indicate

that the policy of dismissing under these circumstances was changed by the enactment of Section 1359.

Two later cases following *Williams v. Nottawa* lend further support to the principle that a federal court has no jurisdiction over an action brought by a collection agent to whom an assignment or transfer has been made for the purpose of creating diversity. In *Southern Realty Investment Co. v. Walker*, 1909, 211 U.S. 603, 29 S.Ct. 211, 53 L.Ed. 346, some Georgia attorneys had created a dummy corporation in South Dakota that was used as an agent to collect the claims of Georgia citizens against Georgia citizens in federal court. The Supreme Court held that under the Act of 1875 a diversity suit could not be maintained by the corporation in behalf of Georgia citizens. In *Central Paper Co. v. Southwick*, 6th Cir. 1932, 56 F.2d 593, Southwick had been assigned four claims for $1.00 each so that he could bring suit in federal court. He, like Mr. Kramer in the case at bar, appears to have arranged a fee for his efforts to collect. While it is not clear from the opinion that the reason for the assignments was to create diversity of citizenship, the court observed that the Act of 1875 and cases like *Williams v. Nottawa* prohibited "assignments of the technical legal titles to claims to plaintiffs for the purpose of permitting them to bring suits in federal courts for the purpose of collecting the same." 56 F. 2d, at 596. It found the four assignments to be colorable or fictitious and hence improperly made to invoke federal jurisdiction.

The three cases just discussed are factually similar to the instant case and serve to demonstrate that courts interpreting the Act of 1875 considered an assignment for the purpose of enabling collection in federal court to be improper within the meaning of the statute. Three other cases, which are not so similar factually but perhaps more well-known, are illustrative of the same proposition. In *Lehigh Mining & Mfg. Co. v. Kelly*, 1895, 160 U.S. 327, 16 S.Ct. 307, 40 L.Ed. 444 and in *Miller & Lux, Inc. v. East Side Canal & Irrigation Co.*, 1908, 211 U.S. 293, 29 S.Ct. 111, 53 L.Ed. 189, stockholders of one corporation transferred fee title in land to a sham corporation in another state without valuable consideration for the purpose of creating federal jurisdiction. In *Miller & Lux*, the Court summarized the transaction as follows:

> . . . the transfer of the property of the California corporation to the Nevada corporation was merely formal,—only a device by which to have the rights asserted by the California corporation in a state court determined by the Federal court rather than by the state court. The agreement that all the property of the California corporation should be transferred to the Nevada corporation was attended by the condition that all the capital stock of the new corporation should be issued—and it was issued—to the California corporation, which remained in existence with full power, as the owner of such stock, to control the operations of the Nevada corporation.

211 U.S., at 304, 29 S.Ct., at 114. The Court held that the Nevada corporation was collusively made plaintiff in the suit for the purpose of creating federal jurisdiction and therefore that jurisdiction failed under the Act of 1875. The reason jurisdiction failed was not that the California corporation made a transfer with the motive of getting into federal court but rather that the transfer was colorable, indeed a sham, and was undertaken in order to create federal jurisdiction. In terms of the statute, the California corporation acted improperly or collusively to invoke jurisdiction of the court. We stress the importance of a colorable or fictitious transfer to the meaning of these cases because in *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 1928, 276 U.S. 518, 48 S. Ct. 404, 72 L.Ed. 681, a very similar case, the Court made an often-quoted statement to the effect that it would not inquire into the motives behind the particular transfer. In that case, the Court found that the transfer was actual inasmuch as the transferor corporation had been dissolved. Having made this finding, it said the existence of a motive to create diversity jurisdiction by the transfer was not fatal.

The cases involving reincorporation in another state are relevant insofar as they show that the Act of 1875 and its successors to 1948 prohibited colorable transfers effected for the purpose of invoking federal jurisdiction. More to the point are the collection-agent cases, for they prove conclusively that under pre-revision law the arrangements between Panama and

Kramer would not have invoked federal jurisdiction. The critical question for this Court, therefore, is whether Section 1359 of the 1948 Judicial Code changed the law. Although language in *Corabi v. Auto Racing, Inc.*, 3d Cir. 1959, 264 F.2d 784, and *City of Eufaula, Alabama v. Pappas*, M.D. Alabama 1963, 213 F. Supp. 749, may imply that the law has changed, the correct answer must be that the law is the same today as it was in 1881 when *Williams v. Nottawa* was decided. The Reviser's Notes indicate that Section 1359 was designed to eliminate some of the defects of the assignee clause, but they do not reflect any change of policy with respect to the Act of 1875 and its successor statutes. While it might be argued that the revised section places greater emphasis on the fact that its application is limited to improper or collusive arrangements, the Reviser's Notes do not suggest a legislative intent to narrow the effect of court decisions previously discussed. In *Fourco Glass Co. v. Transmirra Products Corp.*, 1957, 353 U.S. 222, 77 S.Ct. 787, 1 L.Ed.2d 786, the Supreme Court said that an alteration or condensation of a statute in 1948 did not change the law unless an intention to change was clearly expressed:

> Statements made by several of the persons having importantly to do with the 1948 revision are uniformly clear that no changes of law or policy are to be presumed from changes of language in the revision unless an intent to make such change is clearly expressed.

353 U.S., at 227, 77 S.Ct., at 790. This rule for interpreting the 1948 revision in light of pre-revision law was later reiterated by Justice Goldberg in Chambers. *United States v. FMC Corporation*, 1963, 84 S.Ct. 4, 7.

II.

Appellee's reliance is not really on the argument that Section 1359 changed the law but rather is on the proposition that both the old statutes and the revised version have very narrow application. He points especially to the implication of the *Black & White Taxicab* case, *supra*, that a motive to create federal jurisdiction by reincorporating in another state did not contravene the Act of 1875. As was stated previously, the Court made this statement after having found that the transfer from one corporation to another was real and absolute. While it is true that *Black & White Taxicab* presents a conceptual problem in that the same people no doubt controlled both the dissolved corporation and the newly created one, it must nevertheless be inferred from the opinion that a critical distinction is to be made between actual and colorable transfers. In the instant case, the assignment was colorable in the sense that it did not divest Panama of its interest in the lawsuit. To repeat, Mr. Kramer, the assignee, is nothing but a collection agent who was not involved in and is not knowledgeable about the events leading up to the lawsuit and who has no interest in it aside from his fee. The thrust of *Lehigh Mining* and other cases discussed to this point is that an assignment of this kind made

for the purpose of invoking federal jurisdiction is improper or collusive within the meaning of the statute.

Admittedly, we find some uncertainty in post-revision cases. In *Bradbury v. Dennis, supra,* for example, jurisdiction was sustained as against a contention that the assignment from an insolvent corporation to its nonresident sole stockholder was improper or collusive. Since the transfer was supported by adequate consideration and since there was nothing "surreptitious or fictitious" about it, the court felt that the proscription of Section 1359 was inapplicable. In *Steinberg v. Toro,* D. Puerto Rico 1951, 95 F. Supp. 791, on the other hand, the court dismissed for want of jurisdiction because it considered an assignment from a Puerto Rican corporation to its president, director, and stockholder in New York to be improper. The transaction was found to lack reality:

> . . .it must be concluded that neither the Corporation or the plaintiff ever intended or considered that the assignment, if made, operated so as to completely divest the Corporation of all interest in and power of control over the contract or any rights under it. And the close identity that exists between the plaintiff and the Corporation is likewise convincing that the Corporation has a residual power of control over the contract or any rights under it which is inconsistent with the idea of a real and absolute assignment thereof to the plaintiff.

95 F. Supp., at 797. The court concluded that Congress did not intend to confer jurisdiction on federal courts in cases where diversity of citizenship is achieved by pretense. These cases are more difficult than the instant case because each of them involved an assignee with an interest in the company for which he prosecuted a claim in federal court. In neither case could it be said that the assignee was a mere collection agent who had never even been informed about the nature of the controversy. Despite this distinction, however, *Bradbury v. Dennis* seems difficult to reconcile with pre-revision cases such as *Lehigh Mining*. In *Bradbury*, a Colorado corporation assigned its claims to its nonresident stockholder in order to create diversity; yet it does not appear that the corporation was dissolved or that it really divested itself of any interest in the claims.[3]

[3] As we have suggested, in a situation where a corporation, without giving up its interest, assigns a claim to a stockholder in order to create diversity, the proscription of Section 1359 should apply. A case of this kind should be distinguished from cases in which there is no assignment or other device employed to create diversity and in which the party filing suit has a substantial interest. In *Matthies v. Seymour Mfg. Co.*, D. Conn. 1958, 23 F.R.D. 64, for example, the court overruled an objection to jurisdiction based on Section 1359 because it found that the nonresident plaintiff, as owner of contingent interests in the two trusts involved, had a substantial stake in the litigation. The fact that one of his relatives had a greater interest and had underwritten the costs of litigation was not deemed controlling. The court found no evidence that the plaintiff had actually surrendered control over the conduct of the suit. Similar reasoning was used to sustain jurisdiction in a later case decided by the same court. *See Allstate Ins. Co. v. Lumbermens Mut. Cas. Co.*, D. Conn. 1962, 204 F. Supp. 83.

In *Amar v. Garnier Enterprises, Inc.*, C. D. Calif. 1966, 41 F.R.D. 211, the court dismissed a stockholder's derivative suit on the ground that the plaintiff had been made a stockholder solely for the purpose of enabling him to bring a

While the assignment of a claim from corporation to non-resident stockholder presents a vexing problem, still more troublesome is the appointment of a foreign administrator or executor. In *Corabi v. Auto Racing, Inc., supra,* it was conceded that the resident administratrix had resigned in favor of a nonresident administrator for the sole purpose of creating diversity. The court upheld jurisdiction, saying that it was not prohibited by Section 1359.[4] The case is troublesome because it is difficult to argue with the result despite the fact that the real party in interest appointed a nonresident administrator for the single reason that she wanted the case to be tried in federal court. The result is supported by the rule that the decree of a state probate court naming an administrator cannot be collaterally attacked because of the purposes and motives of the parties when they practiced no fraud upon the court. *Mecom v. Fitzsimmons Drilling Co.*, 1931, 284 U.S. 183, 52 S.Ct. 84, 76 L. Ed. 233. Since the *Mecom* case precluded a collateral attack in federal court on Mr. Corabi's appointment as administrator, the court had no basis for labeling

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diversity derivative suit. He knew nothing about the suit and would have had no control over it. This case and *Matthies v. Seymour Mfg. Co.* appear to be correctly decided. In each, the court determined whether there had been an improper or collusive arrangement to secure federal jurisdiction by asking whether the nominal plaintiff had a substantial interest in the lawsuit or was just a stand-in for some nondiverse party.

[4] Faced with almost identical facts, a number of courts have reached the same result as did the Third Circuit in *Corabi. See, e.g., Lang v. Elm City Construction Co.*, 2d Cir. 1963, 324 F.2d 235; *Todd County, Minn. v. Loegering*, 8th Cir. 1961, 297 F.2d 470; *Stephan v. Marlin Firearms Co.*, D. Conn. 1963, 217 F. Supp. 880.

that appointment as improper or collusive within the meaning of Section 1359.

Were it not for the court's discussion of the meaning of Section 1359, we would not dwell on the *Corabi* case but would simply distinguish it as involving an appointment immune from collateral attack. The problem is that the court defined "improper or collusive" so that the statute would have very narrow application, if any application at all:

> The statute uses the phrase "improperly or collusively" to characterize the manufacture or joinder prohibited by it. The word "collusion" is a strong one. The term "collusion" indicates "A secret agreement and cooperation for a fraudulent or deceitful purpose; deceit; fraud." Webster's New International Dictionary, 2 ed. . . . Certainly to make use of state law to obtain diversity jurisdiction even though the object may be a high verdict in federal court is not collusive within the ordinary meaning of that term. Moreover, the word "collusion" generally is employed to indicate an illegal agreement or understanding between opposing sides of a litigation rather than to an arrangement effected by one side of the sort at bar. Here the plaintiff's side of the case acted for what it deemed to be its own benefit and was opposed heartily by the other party to the litigation. The terms "improper" or "improperly", according to Webster's mean "Not

> suited to the circumstances, design, or end; not appropriate, fit, or congruous; as an *improper* medicine; *improper* dress." Webster gives as synonyms: "Improper, indecent, unseemly, indecorous, unbecoming, indelicate." The word "improperly" clearly connotes impropriety. We cannot perceive that here. Had Congress intended to prohibit the creation of federal diversity jurisdiction under such circumstances as those at bar it could have done so simply by omitting the words "improperly or collusively".

264 F.2d, at 788. By focusing on the literal meanings of the two words, the court virtually emasculated the statute; for it is doubtful that any of the cases under consideration reflect collusion in the sense of fraud or deceit, collusion with the opposing party, or impropriety in the sense of indecorum or indecency. Indeed, when litigants can achieve diversity by such simple devices as assignment to a nonresident collection agent or appointment of a nonresident administrator, it is hard to imagine why they would ever resort to fraud or deceit, actual impropriety, or collusion with the other side. If the statute is to have any utility, its meaning must be derived from the prerevision statutes and cases, not from dictionary definitions of the individual words. In the context of Section 1359 and its predecessor statutes, the phrase "improperly or collusively" means what the courts have said it means. Hence, an attempt to create

federal jurisdiction by colorable assignment or other device without substance is "improper or collusive" within the meaning of the statute. This principle is settled by prerevision cases and remains the law today.[8]

Like *Corabi*, *City of Eufaula, Alabama v. Pappas*, *supra*, evinces a restrictive view of Section 1359. In that case, the city instituted condemnation proceedings against a piece of land owned jointly by the members of a large family. The members who lived in Alabama transferred their interests to Zafero P. Paterson, the one member of the family who lived in another state. The consideration was $1.00, and it was conceded that the purpose of the transfer was to create diversity jurisdiction. Though there was no instrument requiring him to do so, it was understood that Paterson would share any sum he recovered in

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[8] Cases like *Corabi* have prompted Professor Wright to observe that Section 1359 "has been largely ineffective." Wright, *Federal Courts* § 31, at 86 (1963 ed.). To remedy this situation, the American Law Institute has proposed two new sections for the Judicial Code. One of these would attribute the same citizenship to an executor or administrator as the decedent, thus making it impossible to create diversity by appointment of a nonresident. ALI *Study of the Division of Jurisdiction Between State and Federal Courts* § 1301(b)(3) (April 1964 Draft). Section 1309(b) of the same Draft would clearly prohibit assignments or other transfers designed to create diversity jurisdiction:

> Whenever an object of a sale, assignment, or other transfer of the whole or any part of any interest in a claim or any other property has been to enable or to prevent the invoking of jurisdiction under this chapter or chapter 158 of this title, jurisdiction of a civil action shall be determined as if such sale, assignment or other transfer had not occurred. The word "transfer" as used in this section includes the appointment of a trustee, receiver, or other fiduciary, or of any other person to hold or receive interests of any kind, whether made by private persons or by a court or any other official body.

the suit with his transferors.[6] Despite the fact that he was clearly acting as the family's collection agent in federal court and had not received an absolute assignment of the other interests, the district court sustained jurisdiction, reasoning that a contract supported by $1.00 consideration is valid under Alabama law and that the motive to create federal jurisdiction is immaterial. We are unable to distinguish this case from the one before us, but we choose not to follow it. The assignment was colorable in the sense that it did not divest the assignors of their interests in the lawsuit, and it was made for the purpose of creating diversity. In our opinion, the decision upholding jurisdiction under these circumstances represents an unjustified departure from pre-revision cases decided by the Supreme Court and serves to undermine the historic policy of limiting diversity jurisdiction.[7]

As we are firmly convinced that the court below had no jurisdiction over the subject matter, we need

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[6] There appears to be no material distinction between this case and the instant case, but there is the minor distinction that Paterson did not execute a separate instrument stating that each member of the family would share in the recovery to the extent of his interest in the land. The parties simply had an understanding to this effect. The question arises whether we would decide the instant case differently if Kramer had not executed the instrument of reassignment. If it still appeared from all the facts that he was merely a collection agent and that the assignment was not real and absolute, then the result would, of course, be the same.

[7] In *Ferrara v. Philadelphia Laboratories, Inc.*, D. Vermont 1967, 272 F. Supp. 1000, a case involving an assignment of personal-injury claims to a nonresident trustee for the purpose of creating diversity, Judge Leddy discusses in a very thorough fashion the same decisions we have discussed in relation to Section 1359 and reaches substantially the same conclusions about them. The motion to dismiss for want of jurisdiction was granted.

not proceed to the merits of the controversy. The judgment of the district court is REVERSED and the cause REMANDED to that court with directions to dismiss for want of jurisdiction.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 24090

D. C. Docket No. CA 3-1168

CARIBBEAN MILLS, INC.,

Appellant,

versus

CLAYTON S. KRAMER,

Appellee.

Appeal from the United States District Court for the Northern District of Texas.

Before BROWN, Chief Judge, and BELL and THORNBERRY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be and the same is hereby remanded to the said District Court with directions to dismiss for want of jurisdiction in accordance with the opinion of this Court.

It is further ordered and adjudged that the appellee, Clayton S. Kramer, be condemned to pay the costs of this cause

in this Court for which execution may be issued out of the said District Court.

January 26, 1968.

Court Costs:
Docketing cause, etc. . . .$25.00
Cost of Printing
Record 1455.00
Total $1480.00

Issued as Mandate:
MAR 13 1968